

>>> "Petrides, Randy" <rpetrides@co.genesee.mi.us> 10/27/2006 5:05:26 PM >>>

TO: Clerk, Michigan Supreme Court

FROM: David Leyton, Genesee County Prosecuting Attorney

DATE: October 27, 2006

RE: ADM File No. 2005-19, Proposed amendments to MCRs

After asking my trial lawyers to review the proposed amendments, I have these comments:

First, it is important to keep in mind that most Circuit Court jury trials in this state are criminal trials of felonies. I do not know if the civil bar was a primary source of the proposed changes, but the impact will be felt most heavily on the criminal side if these proposals are adopted and made applicable across the board. Please keep in mind the significant differences between criminal and civil trials when you review these proposals. The Constitutional protections afforded to accused defendants are different than the statutory rights of civil defendants. A defendant's very liberty is at stake. The goals and challenges of the Prosecutor in a criminal trial are much different than a plaintiff in a civil trial. The Prosecutor has the higher burden of proof and is limited by Constitutional checks and balances that are unique to the criminal arena. These points are, of course, well known, but bear repeating in the context of these proposals.

In light of the above, it may be prudent to limit the adoption of any of the proposals to civil cases only at least until they have been battle tested in courtrooms.

Second, I can offer these observations on the merits of the proposals from my Assistant Prosecuting Attorneys who regularly conduct jury trials in our local Circuit Court:

1. The idea of submission of trial notebooks to the jury can be useful, but keep in mind the vast difference in resources between well-funded civil lawyers and less well funded Prosecutors and defense attorneys, many of whom are court-appointed. There is often a disparity in resources between parties in criminal cases that can cut each way. The side with fewer resources may be at a distinct disadvantage in producing a trial notebook comparable to the other side with more resources. This could have impact on an accused's right to a fair trial if the Prosecutor is the one with greater resources.
2. The proposal for a panel discussion among experts would be unworkable in a felony trial. It could open the door to putting less qualified experts on the same footing with more qualified experts. This may work well in the large civil case driven by major expert witnesses but not in the more garden-variety expert issues in a criminal case. The idea of allowing expert witnesses to hear each other testify is a good one.
3. Allowing the jury to discuss the case before all the evidence is in can be possibly of use, but, in a criminal case, might open the door for a rogue juror to steer the panel in a wrong direction before all the case is in. Much is at stake in felony trials. This would be an experiment best left to the civil side for the present.
4. Our trial lawyers adamantly and violently oppose allowing the trial judge to comment on the evidence to the jury. Both sides are often suspicious of one judge or another tilting in the opposite direction. Giving license to judges with opinions on felony cases to comment is a recipe for disaster in the criminal side. I doubt if either side would have confidence that the judge's opinions could be kept under wraps. Again, Circuit judges deal daily with criminal cases and are not nearly as detached from them as in the less frequent civil cases.
5. The proposal to allow the jury to list issues that divide or confuse them is fine.
6. The proposal that participants must attend until the verdict should also include the judge. For example, bringing in a substitute to shake the verdict without a major reason does not enhance the dignity of a felony trial.
7. The proposal for interim commentary during trial was uniformly disliked by our trial lawyers. The tightness of procedural controls for a felony trial are perhaps more important than in a civil case. The "informality" that this would create is not a good fit for a felony trial, especially a major one such as homicide or sexual assault.

In summary, the unique requirements of a felony trial would prompt us, who are in the field, to advise extreme caution in applying these proposals to the criminal arena.

Thank you for entertaining our comments.